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March 9, 2017

VIA ECFS

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: CG Docket No. 02-278 - Notice of Ex Parte Communication

Dear Ms. Dortch:

On March 7, 2017, Gary Bosch, General Counsel of bebe stores, inc. ("bebe"), and the undersigned spoke by phone with Christina Clearwater, Kurt Schroeder and Nancy Stevenson of the Consumer Policy Division of the Consumer & Government Affairs Bureau to discuss matters relating to bebe's Petition for Expedited Declaratory Ruling filed on November 18, 2016, and its reply comments filed January 23, 2017, in the above-referenced docket.

During the call, bebe discussed the status of *Meyer, et al., v. bebe stores, inc*. pending before the U.S. District Court for the Northern District of California, bebe's collection of written consent from its customers through their enrollment in its "clubbebe" customer loyalty and marketing program, bebe's text messaging program and the premise of the *Meyer* plaintiffs' Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA") claims, and bebe's double-opt in process and procedures for its text messaging program.

I. STATUS OF *MEYER* CLASS ACTION

During the call, bebe noted that the *Meyer* Court indicated on February 7, 2017, that it would decline any request to stay the *Meyer* litigation pending the FCC's ruling on bebe's Petition. bebe further confirmed that the last day for a hearing on the parties' dispositive motions is May 16, 2017; bebe expects the issue of consent to be briefed by both parties in their motions. Trial is scheduled to commence on August 28, 2017.

In the interim, the parties are completing discovery and have agreed to engage in mediation on April 7.

II. BEBE COLLECTED ITS CUSTOMERS' WRITTEN CONSENT THROUGH CLUBBEBE

During the call, Commission staff asked whether the consent was written where the customer provided her/his mobile phone number in a bebe store at the point of sale ("POS"). bebe explained that the clubbebe Terms & Conditions provided the requisite written consent. For example, Ms. Barrett, the representative plaintiff for the clubbebe class in the *Meyer* litigation, provided bebe with her mobile phone number in 2010 as part of her enrollment in clubbebe and maintained her membership, evidencing her intent to be bound by the written clubbebe Terms & Conditions provided to her in connection with her enrollment.

bebe offers the following clarification regarding the form of written consent that exists for purpose of its Petition:

A. The Mammoth Petition was premised on the written consent embodied in Mammoth's Privacy Policy

In the Mammoth Mountain Ski Area, LLC's ("Mammoth") Petition, Mammoth described the written consent that it obtained as follows:

> Many Mammoth [] consumers purchase [] products and provide their personally-identifiable information to Mammoth on the Mammoth website. By using the Mammoth website, users are subject to a Privacy Policy in which the user 'agrees to be bound by all of [the] terms and conditions' of the website Privacy Policy, and the Policy explains that '[i]f you do not agree to these terms, please do not access or use this site.' Mammoth's Privacy Policy governs how Mammoth collects personally-identifiable information from guests and how Mammoth uses such information. The Policy states:
>
> > When you engage in certain activities on this site as listed below . . ., we may ask you to provide certain information about yourself by filling out and submitting an online form. It is completely optional for you to engage in these activities. If you elect to engage in these activities, however, we may ask that you provide us personal information such as your . . . telephone numbers . . . .
>
> The Policy explains that Mammoth can use a guest's telephone number to 'offer you specially tailored deals,' to 'fill orders, improve our marketing and promotional efforts, . . . improve our product and service offerings, . . . [and] to deliver information to you and to contact you regarding administrative notices.' The Policy further states that '[i]f you choose to not receive promotional material or special offers from us including but not limited to email, direct mail or telephone, we ask that you tell us by opting out . . . .'

Id. p. 2 (footnote omitted). Mammoth argued, in part, that "[t]he purchase process through which Mammoth [] customers engage with Mammoth creates a contract between them. The Mammoth [] Privacy Policy forms part of the contractual agreement between the skier and Mammoth."

Mammoth cites *In re EasySaver Rewards Litig*., 737 F. Supp. 2d 1159, 1172 (S.D. Cal. 2010), in support of its argument that it properly alleges that the purchase of products from its website created a contract between it and its customers that includes its Privacy Policy.[1] Mammoth sought, in part, a ruling that the FCC's new consent rules do not "invalidate prior contractual consents provided in the form of the voluntary provision of a telephone number, where those phone numbers were provided by the consumer subject to an explicit privacy policy that allowed such calls." The FCC granted Mammoth's Petition in its October 14, 2016 Ruling ("2016 Ruling").

B. The bebe Petition is premised on the written consent embodied in the clubbebe Terms & Conditions

As explained in bebe's Petition, in connection with purchasing products from both bebe stores and www.bebe.com, customers often enroll in bebe's clubbebe because of the features and benefits of this program. Approximately 80% of bebe's customers (and 100% of the Post-October 16, 2013 Club Bebe Class) are clubbebe members. The information that is requested as part of the enrollment process includes the customer's name, address, email address and phone number. To enroll, no purchase or mobile phone number is required.

Like Mammoth, the clubbebe Terms & Conditions govern how bebe is permitted to use the information collected from these customers. As explained in bebe's Reply Comments, as part of the enrollment process, Ms. Barrett received both a membership card and a copy of the clubbebe Terms & Conditions.

Like in Mammoth, when they enroll in clubbebe, bebe's customers "agree[] to be bound by the full clubbebe Terms and Conditions," and the Terms & Conditions explain that "[b]y using the clubbebe membership card, members consent to the use of the clubbebe member's [information] for administering the loyalty program, for marketing and promotional purposes unless the member has opted out, and for internal market research by bebe and its affiliates, and consents to the receipt of information provided by bebe." This disclosure "clearly and unmistakably" confirms that the customer is consenting to communications from bebe for marketing and promotional purposes unless the customer opts out. *See, e.g.*, *Satterfield v. Simon & Schuster, Inc*., 569 F.3d 946, 955 (9th Cir. 2009) (citing Black's Law Dictionary 323 (8th ed. 2004) for the definition of "express consent"). The clubbebe Terms & Conditions further explain that "[i]f you do not accept these Terms and Conditions, or any subsequent modifications, your sole and exclusive remedy is to terminate your membership in the program."

For purposes of bebe's Petition, the clubbebe members' consent to be called—texted[2]—by bebe using any number provided by the member was captured (*see Satterfield*, 569 F.3d at 955; *Van*

[1] The *EasySaver Rewards* court rejected the plaintiff's argument that "the Complaint does not identify an actionable contract but instead relies upon general statements of policy" "because the Complaint, when read as a whole, relies on the Plaintiffs' purchases of flowers from Provide's ProFlowers.com internet store. The terms of use, Privacy Policy, and the EasySaver Rewards Policy that appear on Provide's web page are part of that contract." 737 F. Supp. 2d at 1172.

[2] *See Satterfield*, 569 F.3d at 954 ("[W]e find that the FCC's interpretation of the TCPA is reasonable, and therefore (… continued)

Patten v. Vertical Fitness Group, No. 14-55980 (9th Cir. Jan. 30, 2017) (quoting the 1992 Order)) and confirmed in the written clubbebe Terms & Conditions prior to October 16, 2013—under the FCC's prior consent rules. As explained more fully below, clubbebe members expressed their intent to be bound by the Terms & Conditions by completing their enrollment, maintaining their clubbebe membership and accepting the benefits of clubbebe membership.

Like Mammoth, bebe asserts that the process by which customers enroll in clubbebe "creates a contract" between bebe and the customer, and the Terms & Conditions form the written contract between them. Again, like Mammoth, bebe's Petition seeks a ruling that the FCC's new consent rules do not invalidate contractual consents provided in the form of bebe customers' voluntary provision of their telephone number, which confirms that the customer consents to bebe using the information for marketing and promotional purposes unless the customer opts out.

C. Clubbebe members manifested their assent to be bound by the written clubbebe Terms & Conditions by completing their enrollment, maintaining their membership, enjoying membership benefits, and failing to change their profile preferences to withdraw their consent

For the purpose of providing the FCC with some helpful context, Ms. Barrett, the representative for the clubbebe subclass, enrolled in clubbebe in 2010. As part of her enrollment, Ms. Barrett orally provided bebe with her information—including her mobile phone number—in a bebe store at the POS. Importantly, both the FCC and Ninth Circuit agree that, under the FCC's prior consent rules, "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." *See* In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 F.C.C. Rcd. 8752, 8769 (Oct. 16, 1992) ("1992 Order"); *Van Patten* (quoting the 1992 Order). Like in *Van Patten*, Ms. Barrett "as a matter of law…gave prior express consent to receive [bebe's] text messages" when she provided bebe with her mobile phone number as part of her enrollment in clubbebe.

Although she orally provided her number to bebe, in conjunction with her enrollment, Ms. Barrett received a membership card and, more importantly, the written clubbebe Terms & Conditions. State-law principles govern whether a written contract exists between bebe and Ms. Barrett with respect to her clubbebe membership. *See, e.g.,* Cal. Civ. Code § 1589[3] ("A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."); *Knutson v. Sirius XM Radio Inc.,* 771 F.3d 559, 566 (2014); *Nguyen v. Barnes & Noble Inc.*, 763 F.3d

(… continued)

afford it deference to hold that a text message is a 'call' within the TCPA.") (citing In the Matter of Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 19 FCC Rcd. 15927, 15934 (FCC August 12, 2004)).

[3] The clubbebe Terms & Conditions expressly contemplate that they "shall be governed by and construed in accordance with the laws of the State of California[.]"

1171, 1175 (9th Cir. 2014). "The mutual intention to be bound by an agreement is the *sine qua non* of legally enforceable contracts and recognition of this requirement is nearly universal." *Casa del Caffe Vergnanos S.P.A. v. ItalFlavors, LLC*, 816 F.3d 1208, 1212 (2016) (citing Restatement (Second) of Contracts §§ 2, 17; Cal. Juris. 3d Contracts § 67).

Under California law, "[t]he manifestation of mutual consent is generally achieved through the process of offer and acceptance." *Deleon v. Verizon Wireless, LLC*, 207 Cal. App. 4th 800, 813 (2012) (internal citations omitted). "[A]n objective standard [is] applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts." *Norcia v. Samsung Telecomms. Am., LLC*, No. 14-CV-00582-JD, 2014 WL 4652332, *4 (N.D. Cal. Sept. 18, 2014). "[R]eceipt of a physical document containing contract terms or notice thereof is frequently deemed, in the world of paper transactions, a sufficient circumstance to place the offeree on inquiry notice of those terms." *Id*. (citing *Specht v. Netscape Commc'ns. Corp*., 306 F.3d 17, 31 (2d Cir. 2002). In contrast to the FCC's newly added definition of "prior express written consent" (12 C.F.R. § 64.1200(f)(8)), governing state-law does not require Ms. Barrett's "signature" to find a binding written contract exists between bebe and Ms. Barrett because Ms. Barrett was provided with the Terms & Conditions and she manifested her consent to be bound by them through her conduct.[4] By completing her enrollment in clubbebe and maintaining and enjoying the benefits of her clubbebe membership, Ms. Barrett "clearly and unmistakably" manifested her consent to be communicated with by bebe using the phone number she provided for marketing and promotional purposes unless and until she opted out. *See, e.g.*, *Satterfield*, 569 F.3d 955 (citing Black's Law Dictionary 323 (8th ed. 2004)).

The *Meyer* plaintiffs appear to be arguing that in order to be eligible for a limited, retroactive waiver of the FCC's new consent rules, bebe must first establish that it obtained clubbebe members' prior express written consent, as that term is defined in Section 64.1200(f)(8). Section 64.1200(f)(8) defines "prior express written consent" to require "an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered." Aside from the requirement that the consent be in writing, the FCC's new consent rules impose requirements that did not previously exist—requiring the customer's signature, the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered, and a disclosure that the customer was consenting to receive autodialed text messages.

In the 2016 Ruling, the FCC found it reasonable to grant waivers that would "apply to calls for which some form of written consent had previously been obtained." Under the FCC's prior consent rules, "[e]xpress consent is '[c]onsent that is clearly and unmistakably stated.'" *Satterfield*, 569 F.3d at 955 (quoting Black's Law Dictionary 323 (8th ed. 2004)). In 2012, the FCC confirmed that "the TCPA is silent on the issue of what form of express consent—oral, written, or some other kind—is required for calls that use an automatic telephone dialing system

[4] Even though permitted to do so by the clubbebe Terms & Conditions, at no point did Ms. Barrett withdraw her consent to be called at the number that she provided to bebe by changing her profile or preferences.

or prerecorded voice to deliver a telemarketing message." In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 27 F.C.C.R. 1830, 1838 ¶ 21 (F.C.C. Feb. 15, 2012).

That bebe is not required to establish that, prior to October 16, 2013, it obtained "prior express written consent," as defined in Section 64.1200(f)(8), is consistent with the FCC's 2015 Omnibus Ruling and 2016 Ruling. In these rulings, the FCC "acknowledged evidence of apparent confusion on the part of the petitioners and, therefore, found it reasonable to recognize a limited period within which they could be expected to obtain the prior express written consent required by its recently effective rule." Thus, bebe is eligible for a waiver by establishing that it obtained a form of written consent that clearly and unmistakably confirms that the clubbebe members consented to being called by bebe—with a waiver, bebe would not be subject to the FCC's new consent rules until October 7, 2015.

III. THE PREMISE OF THE *MEYER* ACTION: ENROLLMENT IN BEBE'S TEXT MESSAGING PROGRAM IN A BEBE STORE

bebe launched its text messaging program to stay relevant in the market, to attract millennials and new customers in the door, and to otherwise make customers happy. It provided customers, at their election, with an additional way to interact with bebe as part of an omni-channel strategy. bebe extensively marketed its text messaging program in-store, on www.bebe.com and through its social media channels. Like Mammoth, bebe did not purchase mobile phone numbers from third parties or vendors and only ever sent a text to those consumers who voluntarily provided their mobile phone number to it.

bebe also extensively trained its stylists on features and benefits of the program and the process and procedures for enrolling customers in this program. Of particular relevance, its stylist were trained to emphasize to customers using scripted information that by providing a mobile phone number and agreeing that it could be saved in the mobile phone number field in bebe's POS, they were *inviting* bebe to send a single, confirmatory opt-in text message that would enable them to complete their enrollment in bebe's text messaging program.

clubbebe members also received the scripted information from a bebe stylist if they updated their clubbebe profile to include a number in the mobile phone number field. bebe customers who enrolled in clubbebe prior to October 16, 2013 and initiated their enrollment in bebe's text messaging program on or after October 16, 2013 were simply reaffirming their consent to be texted by bebe. As Commission staff is well aware, prior to the FCC's new consent rules, much of the litigation under the TCPA relating to text messaging campaigns focused on whether the customer by simply providing her/his mobile phone number to a merchant gave the requisite consent. *See*, *e.g., Satterfield*, 569 F.3d at 955; *Van Patten.* The *Meyer* litigation with respect to the clubbebe members is unique in that the customer's act of simply providing her/his mobile number to bebe is not the premise of bebe's consent argument. Rather, as discussed above, clubbebe members, by enrolling in clubbebe and maintaining their membership, "clearly and unmistakably" consented to be communicated with by bebe using any telephone number they provided. *See, e.g.*, *Satterfield*, 569 F.3d 955 (citing Black's Law Dictionary 323 (8th ed. 2004)).

After viewing bebe marketing and/or speaking with stylist, customers, including the *Meyer* plaintiffs, understood that they were voluntarily and deliberately providing their mobile phone number to initiate their enrollment in bebe's text messaging program. Upon receipt of the confirmatory opt-in text message from bebe, the customer could complete her enrollment by sending a response "YES" text message back to bebe or ignore the text message and receive no further text messages from bebe. One of the *Meyer* plaintiffs texted the required "Yes" response.

The *Meyer* litigation involves claims premised on the single confirmatory, opt-in text message allegedly received by the Plaintiffs and sent by bebe's vendor Air2Web, Inc. ("Air2Web"). Air2Web would only have sent such a text message if each Plaintiff first voluntarily and deliberately provided her mobile phone number to bebe and consented to it being saved in the mobile phone number field for the specific purpose of initiating her enrollment in bebe's text messaging program.

In support of their argument that the FCC should ignore that Ms. Barrett provided her mobile number to bebe in 2010, the *Meyer* plaintiffs contend that bebe's corporate designees testified that "that no written disclosures were made and no written consent was obtained, when the cell phone numbers were communicated to bebe's employees at the point of sale, which resulted in text messages at issue." They go on to contend that "[i]f bebe had presented any evidence that it obtained prior express written consent, the *Meyer* court likely would not have certified a class action." This is inaccurate. In its ruling on the *Meyer* plaintiffs' motion for class certification, the Court expressly acknowledged that bebe made an argument that the clubbebe members provided the requisite prior express consent through their enrollment in clubbebe and continued membership in clubbebe. The Court further expressly declined to rule on whether bebe obtained the requisite consent from the clubbebe members, leaving this issue for the parties' dispositive motions, which currently are due in mid-April. However, the Court did certify a clubbebe subclass.

The confirmatory, opt-in text message itself did not *introduce* bebe's text messaging program.[5] Rather, it confirmed the scripted information provided by the bebe stylist to Ms. Meyer[6] about the features and benefits of enrolling in the text messaging program. And, it was only sent in

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[5] In 2012, bebe added a 10% off promotional incentive for customers who completed their enrollment in bebe's text messaging program. *Only* if the customer completed her enrollment would she receive a promotion code that could be used for 10% off of her next in-store purchase. Stylists were trained to explain to customers that to receive the discount code, the customer must text the required response to the single, confirmatory opt-in text message from bebe. Simply presenting the single, confirmatory opt-in text from bebe when making a purchase would not have entitled the customer to the 10% off discount.

[6] At the April 26, 2016, hearing on the *Meyer* plaintiffs' motion for class certification, their counsel, Matthew Mendelsohn, acknowledged that

> [bebe spent] a lot of time and effort educating all of their employees at the point of sale to make sure that this specific script is given to everybody who is asked for their cell phone number.
>
> Now, whether or not the individual plaintiffs here remember that, the testimony is and all the evidence is that that disclosure was given to everyone at the time that they were asked for their cell phone number. So whether or not they remember it doesn't change whether or not the disclosure was made.

direct response to Ms. Meyer voluntarily and deliberately providing her number to bebe to initiate her enrollment in the text messaging program.

bebe denies that this single, confirmatory opt-in text message "includes or introduces an advertisement or constitutes telemarketing," as contemplated by Section 64.1200(a)(2). Rather, this text message served the purely administrative purpose of confirming the customer's opt-in. bebe also believes that this one-time text does not violate the TCPA for the reasons set forth in Paragraph 106 and footnote 363 of the FCC's 2016 Omnibus Ruling.

IV. BEBE REQUIRED ITS CUSTOMER TO CONFIRM THEIR OPT-IN TO RECEIVE TEXT MESSAGES FROM BEBE

"Opting-in" refers to the method by which a mobile phone number subscriber confirms her/his consent to receive text messages from a particular sender. Many text messaging programs and campaigns require subscribers to opt-in: (1) to enable customers to provide knowing, voluntary, clear, unmistakable, explicit and express consent to receive text messages from a particular entity or program; (2) to confirm that customers are willing to incur text messaging charges imposed by their carrier; and (3) to confirm that the customer provided a number that belongs to her/him.

bebe's text messaging program—which was terminated in 2015—involved a "dual opt-in" process and procedure. First, the customer provided her/his initial opt-in by voluntarily providing a mobile phone number orally after either receiving the scripted information from the bebe stylist (described above) or by typing in the number after reviewing the disclosures on bebe's website if the enrollment was initiated on www.bebe.com; for a period of time, customers could text to bebe's short code to initiate their enrollment in bebe's text messaging program. Second, regardless of whether a customer provided her/his mobile phone number online, via a short code, or in store, the program was designed to require each person to confirm her/his opt-in by texting the required response to the single, confirmatory opt-in text, e.g., "YES", to complete her/his enrollment in the text messaging program. If she/he did not send the required text message, she/he received no further text messages from Air2Web on bebe's behalf.

V. CONCLUSION

bebe respectfully requests that the FCC find that the public interest is best served by granting bebe's Petition and limited, retroactive waiver of the FCC's consent rules consistent with precedent.

Respectfully submitted,

By: /s/ *Glenn S. Richards*
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